No. 98-594 (4)

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

DON LEE DISTRIBUTOR, INC. (WARREN); DON LEE DISTRIBUTOR, INC. (DEARBORN); POWERS DISTRIBUTING COMPANY, INC.; EASTOWN DISTRIBUTORS, CO.; HUBERT DISTRIBUTORS, INC.; and OAK DISTRIBUTING CO.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondents.*

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 1038,

Intervenor.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF OF PETITIONERS IN SUPPORT OF THEIR PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The National Labor Relations Board ("NLRB" or "Board") and Local 1038, Teamsters ("Union") ignore, but cannot escape, one essential point of law which brings this case to the Court: in its own words, the Union knew on July 12, 1991 that there was a "mutual assistance pact and/or agreement with respect to bargaining between and among the distributors," but did nothing about it. App. 178A (APX 643; GCX 143).[1] The Sixth Circuit applied the erroneous legal standard that "[f]raudulent concealment of a material fact underlying an unfair labor practice charge tolls the six-month limitations period," App. 21a, without regard to the Union's failure to exercise diligence after July 1991.

The question that merits the Court's review is whether an initial fraudulent concealment tolls the statute of limitations even after a party has, at a minimum, "inquiry notice" of the concealed facts. The Sixth Circuit answered the question in the affirmative and thereby materially altered the statute of limitations under Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b). Review should be granted to restore the vitality of Section 10(b).

ARGUMENT

1. The "closely-related" doctrine does not moot the Petition or address the errors of law below. The question is not whether the closely-related doctrine applies –

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[1] For the sake of consistency with the Union's Brief in Opposition, Petitioners cite the Joint Appendix used before the Sixth Circuit as "APX," and designate General Counsel exhibits in the proceedings below as "GCX."

Petitioners concede for purposes of this appeal that it does – but whether that doctrine justifies the decision reached below. It does not.

Even under the closely-related doctrine, "[a] complaint amendment that is otherwise closely related to a timely-filed charge must also be based upon conduct that occurred within six months of that charge." *Redd-I, Inc.*, 290 N.L.R.B. 1115, 1115 (1988) (emphasis added). In the instant case, the charge was filed on April 3, 1991, so the relevant window of conduct is from October 3, 1990 to April 3, 1991. *See* U. Br. at 12 ("October 3, 1990 was the statute bar date [sic] if the 'closely related' doctrine applies.")[2] The Board erroneously asserts that the rulings below appropriately limited the "closely related" analysis to Petitioners' bargaining conduct during this six-month period. *See* NLRB Br. at 13, n.6.

Bad faith bargaining by the Union between October 1990 and April 1991 would excuse bad faith on the part of Petitioners. *See Local 777, Democratic U. Organizing Comm. v. NLRB*, 603 F.2d 862, 911 (D.C. Cir. 1978) (union's bad-faith bargaining may "excuse[ ] the [employer's] obligation to bargain"); *Chicago Tribune Co.*, 304 N.L.R.B. 259, 260 (1991) (union's bad faith bargaining "may remove the possibility of negotiation and thus preclude the existence of a situation in which the [employer's] own good faith can be tested. If it cannot be tested, its absence can hardly be found.").

Neither the Board nor the Sixth Circuit conducted the comparative analysis that is required for the only six-month

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[2] The Board's brief in opposition to this Petition is cited as "NLRB Br." The Union's brief is cited as "U. Br."

period to which the "closely related" doctrine applies. The Board found that the Pact rendered Petitioners' bargaining "unlawful from its inception." App. 29a. As a result, it totally ignored the Union's bad-faith bargaining conduct which had resulted in multiple unfair labor practice charges found to have merit by the Regional Director. App. 108a-114a. The Board instead ruled that "[n]othing the Union did or failed to do makes any difference." App. 85a. Yet, if the "fraudulent concealment" from the Union ended in July 1991 – as found by the Administrative Law Judge ("ALJ")[3] – the Board may not simply rely on the January 1990 Pact, which is time barred, to cast a one-sided pall on the parties' negotiations. *Cf. Chemung Contracting Corp.*, 291 N.L.R.B. 772, 773 (1988) (continued failure to make contributions six months before charge did not revive time-barred repudiation of obligation to make contributions). Rather, the Board must assess both parties' bargaining conduct during the relevant period of October 1990 to April 1991. Remand for such an analysis is required.

2. The Board and the Union admit that the fraudulent concealment doctrine requires reasonable diligence on the part of the party seeking to toll the statute of

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[3] The ALJ acknowledged that Petitioners told the Union that the Pact existed in 1991 but ignored the Union's failure to act upon that knowledge. App. 55a. ("[F]or 16 months, until July 12, 1991 . . . [Petitioners] concealed the existence of the pact.") Long's July 1992 letter to the Office of Appeals, cited by the Board and the Union in their briefs (NLRB Br. at 16; U. Br. at 28-29), adds nothing to the analysis. The ALJ determined that this letter amounted only to the denial of the commission of an unfair labor practice, which does not extend the statute of limitations. App. 56a; *see also Brown & Sharpe Mfg. Co.*, 321 NLRB 924 (1996) (*Brown & Sharpe III*), *aff'd, International Ass'n of Machinists and Aerospace Workers District Lodge 64 v. NLRB*, 130 F.3d 1083 (D.C. Cir. 1997), *cert. denied*, ____ U.S. ____, 118 S. Ct. 2319 (1998).

limitations. NLRB Br. at 14; U. Br. at 23-24. The Board argues that because the Sixth Circuit has recognized the diligence requirement in other contexts, it applied that standard below. The argument is directly contrary to the decision itself, which applied a two-part test that abolishes the need for diligence, and which did not cite any of the cases relied upon by the Board before this Court. App. 21a ("Fraudulent concealment of a material fact underlying an unfair labor practice charge tolls the six-month limitations period.") The Sixth Circuit's standard enunciated below is contrary to the law in other circuits. *See* Petitioners' Opening Brief at 14-15. It also fails to place on the Union the burden of explaining its lack of diligence once it confirmed that Petitioners were bound by an "agreement with respect to bargaining." App. 178a (APX 643; GCX 143).[4]

In all but the Sixth Circuit, the law is clear that once a party is on "inquiry notice" of a potential unfair labor practice, it must act within six months or lose its right to complain. *See Truck Drivers & Helpers Local 179 v. NLRB (Girardi Distributors)*, 993 F.2d 990, 995 (1st Cir. 1993) ("*Irrespective of the extent of the effort to conceal*, the

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[4] The Board argues, without evidence, that the Union believed it would be futile to ask the General Counsel to subpoena the Pact in support of its pending charge because one Petitioner had failed previously to produce the Pact in response to the Union's earlier administrative subpoena and Long claimed the Pact was covered by the attorney-client privilege. NLRB Br. at 17, n.10. The argument is without proof or merit. The March 1, 1990 administrative subpoena was issued in an entirely different proceeding and did not involve, and was not served on, all Petitioners. It also pre-dated Petitioners' acknowledgement that the Pact existed. The Petitioners as a group produced the Pact once the General Counsel did subpoena it. In short, the argument is irrelevant to the Union's failure to act in July 1991, once it was on, at least, inquiry notice of the Pact.

fraudulent concealment doctrine will not save a charging party who . . . is . . . charged with *notice* of a potential claim.") (emphasis added); *Gardner v. Intern'l Telegraph Employees Local No. 9*, 850 F.2d 518, 523 (9th Cir. 1988) (per curiam) (same); *John Morrell & Co.*, 403 N.L.R.B. 896, 900 (1991), *aff'd, United Food & Commercial Workers Union v. NLRB*, 998 F.2d 7 (D.C. Cir. 1993) (Section 10(b) runs when a party suspects or should have suspected an unlawful scheme).

The Board and the Union argue that the Sixth Circuit did *in fact* evaluate the Union's diligence but merely rejected Petitioners' arguments. NLRB Br. at 14-15; U. Br. at 18. In support, however, they can cite only to the appellate court's statement that Petitioners' diligence argument "borders on the disingenuous" because Petitioners "flagrantly misrepresented the Pact's terms." *Id.* The misrepresentations cited by the court, however, date back to early 1990; they are simply non-responsive to the question of whether the Union exercised due diligence when it confirmed the existence of an "agreement with respect to bargaining between and among the distributors" on July 12, 1991.

By focusing on Petitioners' failure to disclose the terms of the Pact, the Sixth Circuit held that once there has been fraudulent concealment, an injured party will never be found to be on inquiry notice and can safely sit on its hands regardless of its later knowledge. Here, the Union observed the Petitioners' bargaining conduct until, in June 1991, "it was very clear to [the Union] that [Petitioners] could not make the decision for themselves. They were . . . marching in lock step. . . . So [the Union] figured [Petitioners] had to have some sort of document that bound them together." App. 121a-122a. Then, after denying for months that any Pact existed, the Petitioners explicitly told the Union on

July 12, 1991 that there was an "agreement with respect to bargaining between and among the distributors." App. 178a (APX 643; GCX 143). The Union failed to notify the General Counsel of the Pact or to seek an investigative subpoena in support of its pending charge. *See* NLRB Casehandling Manual, Section 11770 (Investigative Subpoenas) (App. 180a-181a).[5]

The Sixth Circuit thus absolved the Union of any obligation to act promptly, finding that the Union's knowledge of the *existence* of the Pact was irrelevant to the concealment analysis. App. 22a. In this, the circuit court went beyond the Board's own finding – in contradiction to the discussion in the recommended decision of the ALJ – that it was the concealment of the *existence* of the Pact, and not its terms, that constituted the fraud. *See* App. 30a ("Respondents' fraudulent concealment of the existence of the pact tolled the 10(b) period."). Clearly and admittedly, Petitioners did not – and could not – conceal the existence of the Pact after July 12, 1991; and clearly and admittedly, the Union did nothing once it confirmed its suspicions about the Pact's existence. The standard is not, as the Sixth Circuit would have it, that an initial fraudulent concealment tolls the statute of limitations without regard to later evidence known to the charging party.

The failure of the court below to maintain the same diligence standard that applies in other circuits significantly damages the statute of limitations in the NLRA. Congress intentionally set a very short limitations period to force unions, employers and the Board to deal in a timely way with alleged wrongs or forego their rights to do so, in the

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[5] Petitioners had no obligation to give the Union a copy of the Pact in bargaining. *See* App. 55a.

overarching interest of the statutory goals. The decision below abrogates that congressional policy and materially alters the statute of limitations.

CONCLUSION

The Petition for a Writ of *Certiorari* should be granted so that the judgment of the Sixth Circuit may be reversed and the case remanded for an analysis which evaluates both parties' bargaining conduct between October 1990 and April 1991.

Respectfully submitted,

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APPENDIX

LOCAL UNION No. 1038
affiliated with the
**INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA**
2741 Trumbull Avenue / Detroit, Michigan 48216 / Phone 964-0720

July 16, 1991

W.C. Thomas
West Coast Industrial Relations Association
170 Knowles Drive, Suite 210
Los Gatos, California 95030

Regarding: Information

Dear Mr. Thomas:

At the July 12 meeting with Powers, Steve Wolock requested any documents which reflect a mutual assistance pact and/or agreement with respect to bargaining between and among the distributors. You said there was such a document, and that you would think about providing us with a copy of it.

By this letter we reiterate our request for that document and like documents. We believe this information is relevant to the Union's performance of its bargaining duty. It is relevant and necessary to the intelligent formulation of demands. It will be helpful to have this information in order to know whether some of the concessions we would like to

offer to some Companies, but not others, can reasonably be expected to lead to an agreement with the Companies in question. We request that you provide us this information within ten days of receipt of this letter.

This letter shall also serve to confirm our meeting on August 21, 1991, with Hubert.

Finally, just so there is no confusion on this issue, we are more than willing to meet and talk with each of the Companies about all topics of bargaining, including wages, management rights, casuals and probationary employees. On the particular topics of wages, management rights, casuals and probationary employees, our firm demand, however, is that you restore the status quo in order to eliminate the unfair disadvantage you have put us at by your illegal acts. This is our bargaining demand. We are not demanding that you remedy your unfair labor practices. We are demanding as a matter of bargaining that you restore the status quo on wages, management rights, casuals and probationary employees. Moreover, we are certainly willing to bargain with each of the Companies about such issues as load limits, curfews, starting times, etc. Although as we have repeatedly told you, we do believe that your illegal actions have made meaningful and fair bargaining very difficult.

Very truly yours,

Robert E. Knox
President

NATIONAL LABOR RELATIONS BOARD
CASEHANDLING MANUAL
UNFAIR LABOR PRACTICE PROCEEDINGS

11770 *Investigative Subpoenas*: During certain investigations, in both R and C cases, resort to subpoenas will be necessary in order to ascertain the facts on which to base an administrative decision on the merits.

(Since the object of investigative subpoenas is the ascertainment of facts on which administrative decisions may be based, they should not be used *after* a regional decision to issue complaint unless Division of Operations Management clearance has been procured.)

There is no comparable right to an investigative subpoena available to parties other than General Counsel.

11770.1 *Application for Investigative Subpoena*: The investigative subpoena should be requested of the Regional Director by the attorney assigned to the case. (If no attorney assignment has been made up to this point, it should now be made.) The application, in writing, should contain a statement of the scope of the information or documents sought and of their relevance.

11770.2 *Issuance by Regional Director*: The Regional Director, *where there are no foreseeable problems of enforceability*, has authority to issue an investigative subpoena without clearance by the Division of Operations Management:

a. Where a potential witness or custodian of needed records is willing to testify or to produce the records only if subpoenaed;

b. Where the object of the desired subpoena is the ascertainment of "commerce" data; the

party to be called is a party to the case or the records required are those of a party to the case; *and* there is reasonable cause to believe that the Board would assert jurisdiction;

c. Where the object of the desired subpoena is the procurement of an eligibility list for an impending election; or

d. Where the object of the desired subpoena is the procurement of a payroll list of unit employees to determine the majority status of a union in a C case (sec. 10058.4).

Clearance by the Division of Operations Management should be sought in all other situations. Requests for clearance should contain a copy of the memorandum accompanying the application, any other information deemed relevant, and the Region's recommendations.

Investigative subpoenas, when issued, should be returnable at a time certain before the Regional Director, where this is at all practicable.